In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-432

ARTHUR COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged, with one Abraham Goldstein, with causing the preparation of fraudulent Federal Income Tax returns in violation of 26 U.S.C. 7206(2) and with conspiracy to defraud the United States in the ascertainment of information used by the Internal Revenue Service for determining tax liability. After a jury trial in the United States District Court for the Southern District of New York petitioner was convicted on the conspiracy count and one substantive count. He was sentenced to imprisonment for six months and placed on probation for five years. The court of appeals affirmed on August 12, 1971, and denied a rehearing on September 3, 1971 (Pet. App. A, 10-11).

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The facts are set forth in the opinion below (Pet. App. A, 9–17). In brief, they show that petitioner and Goldstein devised a scheme to avoid tax liability for persons receiving income from winning tickets at racetracks. In order to cash a winning ticket, a bettor, when he goes to a cashier's window, is required to fill out a "verification slip" giving his identity and address. This information is reported to the Internal Revenue Service in accordance with 26 U.S.C. 6041 (a) (Form 1099) so that the Service has a record of an individual's earnings which can be used for later verification of his income tax return. Petitioner's scheme involved hiring a number of persons with losing tickets to cash the winning tickets in their own names and thus save the actual winners from imposition of taxes upon their winnings.

Two of the government's witnesses, who were accomplices of Cobb in the ticket-cashing scheme, had admittedly lied in prior hearings. The nature and extent of this perjury was explored in great detail at trial (Tr. 360–417). Petitioner submitted a number of requests for charges including a request that the judge instruct the jury that "[t]he testimony of an admitted perjurer should always be considered with caution and weighed with great care." (Pet. 5). The court indicated that it was "inclined to grant in substance" the requested charges.[1] Its actual charge on the testi-

[1] "The Court. Mr. Wilson, it is my inclination, unless you can convince me to the contrary, that * * * the Court is inclined to grant in substance every one of those requests and to grant 19 and the last unnumbered request [the request in question].

"Have you any comment to make?

"Mr. Wilson. No, your Honor.

"The Court. Very well. [Tr. 752.]"

mony of the witness who admitted perjury was as follows (Tr. 887–888):

> As you contemplate the testimony before you of a confessed perjurer, I would suggest you might consider whether he presented an instance of purge, p-u-r-g-e or perjury. Was his testimony induced by a genuine desire to purge or cleanse himself of past transgressions and make amends, or did he renew the false swearing indulged in before? In other words, to use the vernacular, did he come clean before you?

Petitioner argues that it was error not to give the charge he requested. The court was not, however, obliged to give the charge in the precise language requested. *Posey* v. *United States,* 416 F. 2d 545, 555 (C.A. 5), certiorari denied, 397 U.S. 946; *United States* v. *Terry,* 362 F. 2d 914, 916 (C.A. 6), certiorari denied, 385 U.S. 1029. The court properly told the jury to evaluate the witnesses' testimony in the light of their past perjury.

Moreover, the court's charge must be considered as a whole. *Parr* v. *United States,* 255 F. 2d 86, 89 (C.A. 5), certiorari denied, 358 U.S. 824.

Here the judge gave a particularly full charge on the general question of credibility, including a portion on accomplice testimony (Tr. 885–891). He said, *inter alia* (Tr. 887):

> And so if you find the testimony of any of these accomplices was deliberately untruthful, reject it. If upon a cautious and careful examination you are satisfied that the witnesses have given a truthful version and the government has sustained its burden of proof beyond a reason-

able doubt in all other respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise, the defendants are entitled to an acquittal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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